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No. 94-631, No. 94-797, No. 94-929

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, *et al.*,
Appellants
v.
DAVIDA JOHNSON, *et al.*,
Appellees

LUCIOUS ABRAMS, JR., *et al.*,
Appellants
v.
DAVIDA JOHNSON, *et al.*,
Appellees

UNITED STATES OF AMERICA,
Appellants
v.
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Appellees

On Appeal from the United States District Court
for the Southern District of Georgia

BRIEF AMICI CURIAE ON BEHALF OF THE DEMOCRATIC NATIONAL COMMITTEE AND THE DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE IN SUPPORT OF THE APPELLANTS

WAYNE ARDEN *
1225 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-2004

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE
& ENDRESON
1250 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 682-0240

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. THIS COURT HAS RECOGNIZED THAT MULTIPLE STATE POLICIES, INCLUDING POLITICAL CONSIDERATIONS, ARE A LEGITIMATE PART OF REDISTRICTING	4
II. THE DISTRICT COURT ERRED IN APPLYING STRICT SCRUTINY TO ANY DISTRICT WHERE RACE IS A SUBSTANTIAL OR MOTIVATING CONSIDERATION IN THE CREATION OF THAT DISTRICT	8
A. *Shaw* Does Not Require Strict Scrutiny In All Instances When Race Is A Substantial Factor In The Drawing Of A District	9
B. Strict Scrutiny Is Not Applicable When An Irregularly Or Bizarrely Shaped District Is Explainable On Grounds Other Than, Or In Addition To, Race	14
C. The Challenged District Is Not Bizarre Or Irregular In Shape And, In Any Event, The Shape Of The Eleventh District Is Not Due Solely To Racial Considerations	16
III. IF THE DISTRICT COURT CORRECTLY APPLIED STRICT SCRUTINY, THE GEORGIA CONGRESSIONAL REDISTRICTING PLAN STILL SATISFIES THIS HEIGHTENED ANALYSIS	18

TABLE OF CONTENTS—Continued

Page

A. Complying With The Voting Rights Act And Eradicating The Effects Of Historical Discrimination Provided Georgia With Compelling Interests To Create The Eleventh District 19

B. The Eleventh Congressional District Is Narrowly Tailored 20

C. The Approach To Narrow Tailoring Adopted By The Lower Court Is Unworkable 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: Page

Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws, 781 F. Supp. 394 (D.Md. 1991) (three judge court), *aff'd*, 112 S. Ct. 2269 (1992) 7

Arizonans for Fair Representation v. Symington, 828 F. Supp. 684 (D.Az. 1992), *aff'd sub nom. Arizona Hispanic Community Forum v. Symington*, 113 S. Ct. 454 (1992) 7

Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) 14, 15

Beer v. United States, 425 U.S. 130 (1976) 12

Burns v. Richardson, 384 U.S. 73 (1966) 6

Chapman v. Meier, 420 U.S. 1 (1975) 4

Davis v. Bandemer, 478 U.S. 109 (1986) 5, 15

DeGrandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992) 14

DeWitt v. Wilson, 1994 WL 325414 (E.D. Cal. 1994), *appeal pending*, No. 94-275 9

Fonfara v. Reapportionment Commission, 610 A.2d 153 (Conn. 1992) 14

Gaffney v. Cummings, 412 U.S. 735 (1973) 5, 14

Garza v. Los Angeles County Board of Supervisors, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991) 20

Good v. Austin, 800 F. Supp. 551 (E. & W.D. Mich. 1992) 14

Growe v. Emison, 113 S. Ct. 1075 (1993) 4, 13, 23

Hastert v. Illinois State Board of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) 14

Hays v. Louisiana I, 839 F. Supp. 1188 (W.D. La. 1993), *vacated and remanded sub nom. Louisiana v. Hays*, 114 S. Ct. 2731 (1994), *further proceedings on remand, Hays v. Louisiana II*, 862 F. Supp. 119 (W.D. La. 1994), *stayed pending appeal*, 115 S. Ct. 31 (1994), *prob. juris. noted*, No. 94-627 9

In re: Reapportionment of Colorado General Assembly, 828 P.2d 185 (Col. 1992) 15

TABLE OF AUTHORITIES—Continued

Page

Johnson v. DeGrandy, 114 S. Ct. 2647 (1994) 13, 14
Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) ..... *passim*
Karcher v. Daggett, 462 U.S. 725 (1983) 7, 14, 15
Marylanders for Fair Representation v. Shaefer, 849 F. Supp. 1022 (D.Md. 1994) 14
McDaniel v. Sanchez, 452 U.S. 130 (1978) 4
People ex rel. Burris v. Ryan, 588 N.E.2d 1023 (Il. 1991), *cert. denied*, 112 S. Ct. 2940 (1992) 15
Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) (three judge court), *aff'd*, 113 S. Ct. 30 (1992) .. 6
Prosser v. Elections Board, 793 F. Supp. 859 (W.D. Wis. 1992) (three judge court) 7, 14
Reynolds v. Sims, 377 U.S. 533 (1964) 7
Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (three judge court), *appeal pending*, No. 94-923 ..... 9, 19-20
Shaw v. Reno, 113 S. Ct. 2816 (1993) ..... *passim*
Thornburg v. Gingles, 478 U.S. 30 (1986) 12, 13, 20-23
United Jewish Organizations of Williamsburg v. Carey, 430 U.S. 144 (1977) 10, 11
Upham v. Seamon, 456 U.S. 37 (1982) 4
Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), *appeals pending*, Nos. 94-805, 94-806 9
Voinovich v. Quilter, 113 S. Ct. 1149 (1993) 13, 14, 20
Wesch v. Hunt, 785 F. Supp. 1491 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 112 S. Ct. 1926 (1992) 7, 14
Wilson v. Eu, 823 P.2d 545 (Cal. 1992) 14
White v. Weiser, 412 U.S. 783 (1973) 6
Wise v. Lipscomb, 437 U.S. 535 (1978) 4
Wood v. Broom, 257 U.S. 1 (1932) 15

Constitution, Acts and Statutes:

United States Constitution, Fourteenth Amendment 4, 11
United States Constitution, Fifteenth Amendment .. 11
United States Constitution, Article I, Section 2 .... 4, 7

TABLE OF AUTHORITIES—Continued

	Page
The Apportionment Act of 1911, 37 Stat. 13 (1911)	15
The Apportionment Act of 1929, 46 Stat. 21 (1929)	15
Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, as amended (1982)	3, 4, 13, 19, 20
Voting Rights Act, § 2, 42 U.S.C. § 1973	12-14, 20-24
Voting Rights Act, § 4(b), 42 U.S.C. § 1973(b)	12
Voting Rights Act, § 5, 42 U.S.C. § 1973(c)	12, 20
Miscellaneous:	
National Conference of State Legislatures, Redistricting Provisions: 50 State Profiles (1989)	15
28 C.F.R. § 51.67 (1987)	12
B. Cain, The Reapportionment Puzzle, (1984)	22
B. Grofman, L. Handley, R. Niemi, Minority Representation and the Quest for Voting Equality, (1992)	22
Niemi, Grofman, Carlucci, Hofeller, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J.Pol. 1155 (1990)	21-22
Young, *Measuring the Compactness of Legislative Districts*, XIII Legis. Stud. Q. 105 (1988)	22

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INTEREST OF AMICI

The Democratic National Committee (DNC) is the national political organization of the Democratic Party.

The Democratic Congressional Campaign Committee (DCCC) is the political organization for Democratic Members of the House of Representatives and is responsible for assisting Democratic candidates running for election to the House.

The DNC and DCCC both have an interest in the issues presented in this case, specifically, the redistricting process and the laws governing the configuration of congressional districts. So too, the *amici* have an interest in ensuring that all citizens have an equal opportunity to participate in the political process, and that laws enacted to further that goal are vigorously implemented.

Pursuant to Rule 37 of the Rules of this Court, written consent of all of the parties for the filing of this brief has been lodged with the Clerk.

STATEMENT OF THE CASE

In the interest of brevity, the *amici* adopt the statement of the case set forth in the brief of the Abrams appellants.

SUMMARY OF ARGUMENT

1. When drawing a redistricting plan, a legislature must comply with applicable law, but beyond that is free to pursue a variety of state interests and policies, oftentimes including political or partisan goals. This Court has on numerous occasions recognized the legitimacy of these state redistricting policies, including political considerations. As a result, the particular configuration of a redistricting plan cannot be fully understood without an appreciation for the many state interests and policies that are reconciled by the legislature during the redistricting process.

2. In *Shaw v. Reno*, 113 S.Ct. 2816 (1993), the Court held that a plan was subject to strict scrutiny if a bizarrely or irregularly shaped district was explainable solely on grounds of race. The court below erred by expanding

this rule to apply strict scrutiny to any district, regardless of its shape, in which race was a substantial or motivating factor. Because of legal requirements, including compliance with the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, race is a "substantial" factor in the creation of many districts. The lower court's rule will result in a strict scrutiny review of virtually every majority minority district in the country, a result not required by or contemplated by *Shaw*.

In addition, however, the lower court erroneously assumed that the configuration of the district under review was caused solely by race. The lower court failed to appreciate that personal, political, partisan, historical and geographic factors also, and in some instances, primarily, contribute to the irregular shape of many race-based districts. In such cases, the bizarre shape of the district is not "solely," or often, even primarily, explainable by race. Under *Shaw*, strict scrutiny should not apply to such race-based districts, even if they are irregular in shape.

3. Even if strict scrutiny is applicable to the district under review, the lower court erred in rejecting remediation of historical discrimination as a compelling state interest. Further, the court improperly concluded that § 2 of the Voting Rights Act did not justify the creation of a minority district in south-central Georgia. The lower court improperly rejected extensive evidence in the record demonstrating the existence of racially polarized voting. And it set an unrealistic standard for narrow tailoring, in holding that the minority composition of the challenged district is too high. Social scientists have only an inexact ability to identify the precise point at which the percentage of minority voters will satisfy the § 2 requirement to provide such voters with an equal opportunity to elect candidates of their choice. The lower court's conclusion that the Georgia plan over-concentrates minority voters fails to give appropriate latitude to legislative decisions which are necessarily based on imprecise estimates.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT MULTIPLE STATE POLICIES, INCLUDING POLITICAL CONSIDERATIONS, ARE A LEGITIMATE PART OF REDISTRICTING

This Court has repeatedly held that the power of a state to redraw state legislative and congressional districts is a fundamental right reserved to the states. *Wise v. Lipscomb,* 437 U.S. 535, 539 (1978). "Redistricting and reapportioning legislative bodies is a legislative task, which the federal court should make every effort not to preempt." *Id.* at 539. In *Chapman v. Meier,* 420 U.S. 1 (1975), this Court noted "[w]e say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court." *Id.* at 27. *See also Growe v. Emison,* 113 S.Ct. 1075, 1081 (1993) ("[T]oday we renew our adherence to the principles expressed in [*Scott v.*] *Germano,* which derive from the recognition that the Constitution leaves with the States primary responsibility for the apportionment of their federal congressional and state legislative districts").

It is also well established that a legislatively enacted redistricting plan must be accorded substantial deference. A federal court should not substitute its own reapportionment plan and policy choices for those of the state, acting through its elected officials. *Upham v. Seamon,* 456 U.S. 37, 40 (1982); *McDaniel v. Sanchez,* 452 U.S. 130 (1978).

So too, the Court has recognized a wide variety of state interests and state policies which the legislature may legitimately consider in crafting a redistricting plan. In drawing a congressional plan, a state must of course comply with the requirements of Article I, Section 2 and the Fourteenth Amendment to the United States Constitution, as well as the Voting Rights Act, 42 U.S.C.

§ 1973 *et seq.*, as amended (1982). But beyond these legal minima, there are a range of permissible policy choices that reflect the complicated and often idiosyncratic interplay of political, partisan, personal, historical and geographic considerations that inevitably are part of the redistricting process. The Court has not only recognized the fact of these considerations, but has also held them to play a legitimate role in the process. In understanding any redistricting plan, including a plan that contains race-based districts, it is vital to understand the role often played by these legitimate—and wholly non-racial—factors.

First and foremost, political considerations are always a factor in redistricting. This Court has acknowledged as much:

> Politics and political considerations are inseparable from districting and apportionment. . . . It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

Gaffney v. Cummings, 412 U.S. 735, 753 (1973). In *Gaffney*, the Court upheld a redistricting plan that "attempted to reflect the relative strength of the [political] parties in locating and defining election districts." *Id.* at 752.

In addition to partisan proportionality, there is often an inherent dynamic to use the redistricting process for political advantage. In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court acknowledged this aspect of redistricting:

> [W]e think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win. . . .
>
> As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.

478 U.S. at 128-29.

The Court held that a legislature's political motives in redistricting would not be unconstitutional unless its plan works to the long term and systematic disadvantage of an identifiable political group. *Id.* at 133. But short of that extreme case, the courts are to give free rein to the frankly political dynamics of this most political of all legislative activity. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992) (three judge court), *aff'd*, 113 S.Ct. 30 (1992). Such politics can usually explain a good deal about a redistricting plan, from the overall partisan composition of the delegation down to the particular configuration of individual district lines.

A subset of political concern in redistricting is the protection of incumbents. Again, the Court has held this to be a legitimate legislative goal, one that works to preserve the seniority of a state's congressional delegation, with the attendant benefits that such seniority brings, and to maintain the relationship between an elected official and his or her constituents. In *White v. Weiser*, 412 U.S. 783 (1973), the Court noted that it "d[id] not disparage" a state policy "frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved" in Congress. *Id.* at 791; *see also Burns v. Richardson*, 384 U.S. 73, 89 n.16

(1966) (drawing district boundaries to minimize the number of contests between incumbents does not establish invidiousness). So too, in *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court held that "preserving the cores of prior districts, and avoiding contests between incumbent Representatives," both to be legitimate legislative policies that, if consistently applied, would justify deviation even from the strict standard of absolute population equality that is imposed on congressional plans by Article I, Section 2.[1]

The Court in *Karcher* also recognized the legitimacy of other traditional state redistricting goals: drawing compact districts and respecting municipal boundaries. This recognition was affirmed in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), where the Court noted that district lines may properly be drawn "to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." 113 S. Ct. at 2826; *see also Reynolds v. Sims*, 377 U.S. 533, 578 (1964). Lower courts have recognized as well the related goal of avoiding the splitting of election precincts or wards. *E.g.*, *Prosser v. Elections Board*, 793 F. Supp. 859, 866 (W.D. Wis. 1992) (three judge court).

All these factors, particularly the political ones, are relevant to explaining any congressional redistricting map.

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[1] *See also Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws*, 781 F. Supp. 394, 397 (D.Md. 1991) (three judge court), *aff'd*, 112 S. Ct. 2269 (1992) ("recognizing incumbent representatives with its attendant seniority, in the House of Representatives" held legitimate); *Wesch v. Hunt*, 785 F. Supp. 1491, 1499 (S.D. Ala. 1992) (three judge court), *aff'd sub nom. Camp v. Wesch*, 112 S.Ct. 1926 (1992) (modifying a court-drawn plan so that two congressmen will not be in the same district); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684 (D.Az. 1992) (three judge court), *aff'd sub nom. Arizona Hispanic Community Forum v. Symington*, 113 S. Ct. 454 (1992) (court-drawn plan avoided the "outdistricting of incumbents" to enable the voting population of a district to maintain its relationship with its particular representative).

In understanding the configuration of any district—whether race-based or not—full measure must be given to the interplay of political and partisan factors along with other state redistricting criteria. The assessment becomes even more difficult in a race-based district because the requirements of the Voting Rights Act are imposed upon —but certainly do not replace—these political calculations and other legitimate state policy choices. Although it is possible that the shape of a district could be explained by race, and race alone, it would be the rare case when political and partisan concerns did not substantially affect the shape as well.

II. THE DISTRICT COURT ERRED IN APPLYING STRICT SCRUTINY TO ANY DISTRICT WHERE RACE IS A SUBSTANTIAL OR MOTIVATING CONSIDERATION IN THE CREATION OF THAT DISTRICT

The majority opinion below in *Johnson v. Miller*[2] misapplied the holding of this Court in *Shaw v. Reno*, and improperly invoked strict scrutiny. According to the district court majority:

> The proper interpretation of *Shaw v. Reno*'s "race-based" requirement is that, in order to invoke strict scrutiny, it must be shown that race was the *substantial or motivating consideration* in creation of the district in question. That term requires that the legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was *the overriding, predominant force* determining the lines of the district.

J.S. App. at 36. (Emphasis in original.)[3]

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[2] The decision is reported at 864 F. Supp. 1354 (S.D. Ga. 1994).

[3] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Abrams Appellants.

This approach is similar, although not identical, to the approach adopted by other lower courts addressing *Shaw* claims. *See Shaw*

The lower court determined that race was the "overriding, predominant force" determining the shape of the Eleventh Congressional District and held that since the State of Georgia failed to establish a compelling state interest, the districting plan "fails strict scrutiny under the Fourteenth Amendment." J.S. App. at 89. By focusing solely on racial motivation, the lower court failed to appreciate that a *Shaw* claim arises only when racial motivation is directly and solely responsible for a bizarrely shaped district. In giving insufficient weight to the relationship of race and bizarre configuration, the lower court's approach expands the application of strict scrutiny in redistricting cases far beyond the bounds set forth in *Shaw*.

A. *Shaw* Does Not Require Strict Scrutiny In All Instances When Race Is A Substantial Factor In The Drawing Of A District

Under *Shaw*, race consciousness alone does not trigger strict scrutiny. It is only when race-based districting results in a bizarrely shaped district, and indeed, is the sole explanation for the bizarre shape, that strict scrutiny is triggered.

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v. Hunt, 861 F. Supp. 408, 431 (E.D.N.C. 1994) (three judge court), *appeal pending*, No. 94-923 (strict scrutiny is triggered "by proof that the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority"); *Hays v. Louisiana I*, 839 F. Supp. 1188, 1194 (W.D.La. 1993), *vacated and remanded sub nom. Louisiana v. Hays*, 114 S. Ct. 2731 (1994), *further proceedings on remand, Hays v. Louisiana II*, 862 F. Supp. 119 (W.D.La. 1994), *stayed pending appeal*, 115 S. Ct. 31 (1994), *prob. juris. noted*, Nos. 94-627; (applying strict scrutiny when a "legislature . . . *intentionally* draws one or more districts along racial lines"); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *appeals pending*, Nos. 94-805, 84-806 (strict scrutiny applies if there was an intent to create a majority minority district, even if a bizarre or irregular shape is due to non-racial factors); *But c.f. DeWitt v. Wilson*, 1994 WL 325414 (E.D. Cal. 1994), *appeal pending*, No. 94-275 (race consciousness alone does not trigger strict scrutiny unless "extremely irregular district boundaries" are drawn solely on the basis of race).

In *Shaw*, this Court held that "redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race . . . demands the same close scrutiny that we give other state laws that classify citizens by race." 113 S. Ct. at 2825. *Shaw* does not require strict scrutiny whenever race is a substantial or motivating factor in the drawing of a district: "We express no view as to whether the intentional creation of majority-minority districts without more always give rise to an equal protection claim." *Id.* at 2828. As recognized by Judge Edmondson in his dissenting opinion in *Johnson*, "Highly irregular shape—the appearance of the district—is the critical element of this new cause of action under the Equal Protection Clause." J. S. App. at 94.

The lower court majority erred in placing no weight on the appearance of the district in concluding that strict scrutiny applied. According to Judge Edmondson, "[t]he district's shape is no mere piece of evidence; it is a critical part of the cause of action." J. S. App. at 96-97.

> No fewer than six times the *Shaw* Court repeats that a district may be challenged on the grounds that it is "bizarre," "highly irregular" or "irrational on its face". . . . That the Court presented the issue in this manner cannot be ignored. To hold that the proper inquiry is simply whether race was a "substantial factor" ignores the plain language of the opinion.

J. S. App. at 96 n.3 (citations omitted).

The importance of district shape in a *Shaw* claim is evident from the *Shaw* Court's discussion of *United Jewish Organizations of Williamsburg v. Carey*, 430 U.S. 144 (1977) ("*UJO*"). The *Shaw* decision did not disturb this Court's previous ruling in *UJO* in which a majority of the Court concluded that the conscious use of race in the design of majority minority legislative districts is not

per se unconstitutional.[4] The race classification claim recognized in *Shaw* was distinguished from *UJO* because:

> the plaintiffs in *UJO* . . . did not allege that the plan, on its face, was so highly irregular that it could be understood only as an effort to segregate voters by race. Indeed, the facts of the case would not have supported such a claim.

Shaw, *supra* at 2829 (emphasis added). The *Shaw* majority also acknowledged that three Justices in *UJO* approved New York's use of race, in part, because it adhered to traditional districting principles:

> We think it also permissible for a State, *employing sound redistricting principles such as compactness and population equality*, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose *residential patterns afford the opportunity* of creating districts in which they will be in the majority.

Id. (*quoting UJO*, 430 U.S. at 168).

Thus, a plain reading of *Shaw* and *UJO* indicates that it is not the use of race in the districting process *per se* which triggers strict scrutiny, but the existence of an irregularly or bizarrely shaped district drawn solely on the basis of race. "[W]e believe that reapportionment is one area in which appearances do matter." 113 S. Ct. at 2827. The key element of a *Shaw* claim is that a "districting plan be 'so bizarre on its face' . . . or 'irrational on its face' . . . or 'extremely irregular on its face,' . . . that it 'rationally cannot be understood as anything other than

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[4] Although only a plurality of this Court determined that "neither the Fourteenth nor Fifteenth Amendment mandates a *per se* rule against using racial factors in districting and apportionment," *UJO*, 430 U.S. at 161, two other Justices rejected the argument that "racial awareness in legislative reapportionment is unconstitutional *per se*." *Id.* at 179 (Stewart, J., joined by Powell, J., concurring).

an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.' " *Id.* at 2848 (Souter, J. dissenting).

That district shape in conjunction with the use of race, and not the use of race alone, is the linchpin of a *Shaw* claim is supported by this Court's interpretation of the Voting Rights Act. The Act requires a jurisdiction to be cognizant of race when redrawing political boundaries. Under § 5, 42 U.S.C. § 1973(c), covered jurisdictions [5] must be race conscious to determine if retrogression of minority voting strength has occurred.

In *Beer v. United States*, 425 U.S. 130 (1976), this Court held that to obtain preclearance a jurisdiction must establish that a voting change will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. This requires a "covered" jurisdiction to analyze the effect of a newly drawn plan on minority voters. For example, in *Beer*, a redistricting plan for the New Orleans City Council was precleared since it increased the number of majority African American districts. *Id.* at 142.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, also requires that a jurisdiction pay careful and conscious attention to race. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court held that plaintiffs must establish three necessary preconditions to prove that "multimember districts operate to impair minority voters' ability to elect representatives of their choice." *Id.* at 50. These three preconditions are:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically

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[5] Jurisdictions wholly covered under § 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b, as amended, include Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia and several counties or towns in California, Florida, Michigan, New Hampshire, New York, North Carolina and South Dakota. 28 C.F.R. § 51.67 (1987).

> compact to constitute a majority in a single-member district . . .
>
> Second, the minority group must be able to show that it is politically cohesive . . .
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Id. at 50-51.

This Court subsequently held that the *Gingles* preconditions also apply to challenges to single member districts. *Growe, supra* at 1084. Under *Gingles,* therefore, any jurisdiction with a sufficiently large and cohesive minority population and a pattern of legally significant white bloc voting must engage in race conscious redistricting in order to avoid committing a violation of § 2.

Moreover, this Court has previously recognized and upheld the use of race in the redistricting process. In *Voinovich v. Quilter,* 113 S. Ct. 1149 (1993), the Court upheld Ohio's race conscious legislative redistricting and rejected a lower court's holding "that § 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation." *Id.* at 1156. Similarly, in *Johnson v. DeGrandy,* 114 S. Ct. 2647 (1994), Florida's deliberate creation of a proportionate number of majority minority districts within Dade County helped defeat a claim that the redistricting plan diluted minority voting strength.

Since compliance with the Voting Rights Act is such a critical consideration in redistricting—following only the constitutional requirement of population equality in importance—race will always be at least a substantial or motivating factor in the drawing of legislative districts in any jurisdiction with significant concentrations of mi-

nority population.[6] Thus, the standard adopted by the court below, although claiming to be a middle ground approach, J.S. App. at 36, would subject nearly every redistricting plan, regardless of the shape of the districts, to a strict scrutiny analysis.

B. Strict Scrutiny Is Not Applicable When An Irregularly Or Bizarrely Shaped District Is Explainable On Grounds Other Than, Or In Addition To, Race

Just as the use of race alone is not sufficient to trigger strict scrutiny, so too the bizarre shape of a district in and of itself does not trigger strict scrutiny. It is only when race is the sole explanation for a bizarrely or irregularly shaped district that strict scrutiny is properly applied.

As this Court has recognized, "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for . . . districts." *Gaffney*, 412 U.S. at 752 n.18; *Badham v. Eu*, 694 F. Supp.

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[6] It is evident that virtually every state utilized racial factors when drawing legislative and congressional districts following the 1990 census. *See Johnson v. DeGrandy, supra*; *Voinovich, supra*; *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992); *Fonfara v. Reapportionment Commission*, 610 A.2d 153 (Conn. 1992); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022 (D.Md. 1994). In addition, federal courts, when confronted with the responsibility of adopting redistricting plans, have also relied upon racial criteria. In *Good v. Austin*, 800 F. Supp. 551 (E. & W.D. Mich. 1992), the court set forth criteria to adopt a congressional redistricting plan:

> Any plan that is adopted must satisfy three different levels of criteria. The first and foremost criterion is the constitutional requirement of precise mathematical equality of population, to the extent mathematically possible, in each district. *Karcher v. Daggett*, 462 U.S. 725, 732 . . . Second, the plan must comply with the requirements of Section 2 of the Voting Rights Act . . . Finally, the plan must balance a wide array of secondary or equitable criteria.

Id. at 554. *See also DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1083-1084 (N.D. Fla. 1992); *Hastert v. Illinois State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991); *Prosser v. Elections Board, supra*; *Wesch v. Hunt, supra.*

664, 671 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989). Nothing in the Constitution or any federal statute requires that congressional districts be compact.[7] Indeed, a visual review of the map of many states would reveal bizarrely shaped and highly irregular districts. *E.g., Bandemer,* 478 U.S. at 116, 138 (recognizing "the irregular shape of some district lines"); *Karcher,* 462 U.S. at 762 (Stevens J., concurring) (describing the congressional district configurations as "bizarre" and "uncouth"); *Badham,* 694 F. Supp. at 671 (noting the "bizarre and irregular shapes of districts"). The irregular shape of these districts can be explained by a multitude of factors, some geographic, some political, and some historical.

Likewise, the irregular shape of a race-based district alone does not trigger strict scrutiny. To be sure, some race-based districts are irregularly shaped, as are some white districts. But the bizarre shape of many of these districts can be explained not by race, but by the myriad of other legitimate factors or policies that a state pursues. For instance, it is often the case in drawing a minority district that a relatively compact minority district

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[7] This was not always the case. The Apportionment Act of 1911, 37 Stat. 13 (1911), provided:

> That in each state entitled under this apportionment to more than one Representative, the Representative . . . shall be elected from districts composed of a contiguous and compact territory. . .

In the Apportionment Act of 1929, 46 Stat. 21 (1929), Congress omitted any requirement that congressional districts consist of contiguous and compact territory. *See Wood v. Broom,* 257 U.S. 1, 7 (1932) (by omitting the compactness requirement, it was "manifestly the intention of Congress" to remove such requirements).

By contrast, some state constitutions and statutes impose a compactness requirement on state legislative redistricting. *In re: Reapportionment of Colorado General Assembly,* 828 P.2d 185 (Col. 1992); *People ex rel. Burris v. Ryan,* 588 N.E.2d 1023 (Ill. 1991), *cert. denied,* 112 S. Ct. 2940 (1992). *See also* National Conference of State Legislatures, Redistricting Provisions: 50 State Profiles (1989) (listing state by state redistricting requirements).

can be created. But such a district might result in political consequences unacceptable to the legislature, or disrupt incumbents in the area and thereby threaten the seniority of the state's congressional delegation. In such cases, the legislature might depart from creating the most compact minority district possible for reasons that have nothing to do with race, but have everything to do with partisan, political or other nonracial factors.

In such a case, the fact that a minority district is bizarrely shaped is not caused by, or explained by, race. Thus, in such a case the conjunction of facts that properly trigger a *Shaw* claim—the intentional creation of a minority district that, because of race, results in a highly irregular district—is not present. Only when race is the sole explanation for a bizarrely shaped or highly irregular district should strict scrutiny be utilized.

C. The Challenged District Is Not Bizarre Or Irregular In Shape And, In Any Event, The Shape Of The Eleventh District Is Not Due Solely To Racial Considerations

The Eleventh Congressional District is not so bizarre or irregular in shape as to raise concerns that the district "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw, supra* at 2828. Dr. Lisa Handley, an expert witness for the state, submitted a report which concluded that the Eleventh District is reasonably compact and regular. State D. Ex. 177 at 2. According to Dr. Handley: "The vast majority of the district's boundary lines follow pre-existing state, county and municipal boundaries." Specifically, Dr. Handley found that 71.1% of the Eleventh District's boundaries follow such boundaries. *Id.* at 3. In addition, "the great bulk of the . . . district is made up, physically and geographically, of intact county areas." *Id.* at 4. For example, eighty-seven percent of the Eleventh's areas is contained wholly within intact

counties." *Id.* These figures place the Eleventh District near the average for Georgia's other congressional districts. *Id.* at 3-4.[8]

Even if this Court determines that the Eleventh District is bizarre or irregular in shape, strict scrutiny should not have been employed. The shape of the Eleventh Congressional District was determined not solely on the basis of race, but instead reflects other considerations as well. Trial testimony established that numerous non-racial factors influenced the final design of the District.

Areas were included and removed from the Eleventh District for purely political or personal reasons. T. Vol.

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[8] Additional comparisons between the Eleventh District and Georgia's other congressional districts also indicate that the Eleventh District is not so unusual in shape. According to Judge Edmondson:

> 1. The size of the district is not particularly noteworthy. Georgia's Districts One, Two and Eight each have a total area of 10,100 square miles. In contrast, the Eleventh District has an area of 6,780 square miles.
>
> 2. The district's 1,184 miles of borders is not distinctive when compared to the Second (1,243 miles) or the Eighth (1,155 miles) Districts.
>
> 3. Plaintiffs claim that the district is bizarre because it comes within 58 miles of crossing the entire State. But, the Ninth District spans the entire northern border of the State and the First, Second and Eighth Districts begin at the Florida border and stretch north to almost the middle of the state.
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> 6. Georgia's congressional districts have no tradition of being neat, geometric shapes. And, areas of the Second and Eighth Districts . . . look—as irregular or—much more irregular. The same may be said of the Third District . . . To be sure, the Eleventh makes curious turns in some areas . . . But, in these areas most of the lines follow existing city boundaries or major highways and roads. A comparison of . . . Georgia's Eleventh District to the district in *Shaw* or to districts being successfully challenged in other states supports the conclusion that the Eleventh District is not highly irregular or, put differently, bizarre.

J.S. App. at 97-99.

IV, 172-178; T. Vol. I, 107-109; T. Vol. III, 265. For example, the chair of the senate reapportionment committee requested that a majority white precinct in which his son lived be included in the district. T. Vol. II, 87, 202. In addition, Butts and Henry Counties were included in the district to get the votes of certain legislators, T. Vol. II, 206-09, and only a small slice of Effingham County is included in the district because a white representative wished to keep as much of the county out of the Eleventh as possible. J.S. App. at 44 n.25. Some of the irregular shape was also due to adherence to political and precinct boundaries. T. Vol. II, 197-200, 207-209, 224. Finally, the decision of the legislature to include certain geographic areas in other districts affected the final design of the Eleventh District. T. Vol. II, 93.

Although it is evident that Georgia drew the Eleventh District with the intent of creating a majority minority district, a multitude of non-racial factors also influenced the final shape of the district, and contributed to the irregularity of its shape. These factors reflected legitimate state interests, to which the courts should accord deference. The district court erred in not providing this deference to Georgia's policy choices, and in subjecting the challenged district to strict scrutiny instead.

III. IF THE DISTRICT COURT CORRECTLY APPLIED STRICT SCRUTINY, THE GEORGIA CONGRESSIONAL REDISTRICTING PLAN STILL SATISFIES THIS HEIGHTENED ANALYSIS

Even if strict scrutiny should be applied to the Eleventh Congressional District, the lower court erred in holding the District was not narrowly tailored to further a compelling state interest.

A. Complying With The Voting Rights Act And Eradicating The Effects Of Historical Discrimination Provided Georgia With Compelling Interests To Create The Eleventh District

At trial, appellants offered several compelling justifications for the Eleventh District: complying with the Voting Rights Act, eradicating the effects of past or present racial discrimination, and achieving proportional representation. J.S. App. at 52-53. The district court erroneously concluded that none of these justifications was sufficiently compelling. J.S. App. at 89.

In *Shaw*, this Court recognized that complying with the Voting Rights Act and eradicating the effects of past racial discrimination may serve as compelling state interests. 113 S. Ct. at 2830-2832. According to the Court, "States certainly have a very strong interest in complying with federal anti-discrimination laws that are constitutionally valid as interpreted and applied." *Id.* at 2830. Similarly, the Court noted that "[w]e previously have recognized a significant state interest in eradicating the effects of past racial discrimination . . ." *Id.* at 2831-2832.

However, in contrast to this Court's decision in *Shaw*, the *Johnson* court "conclude(d) that a compelling state interest in remedying prior discriminatory voting practices does not exist independent of the Voting Rights Act." J.S. App. at 56. In reaching this conclusion, the *Johnson* court incorrectly assumed that unless minority voters can satisfy the requirements of the Voting Rights Act, a State does not have "a strong basis in evidence for concluding that remedial action is necessary." J.S. App. at 57.

The *Johnson* court failed to recognize that a jurisdiction may have a continuing history of racial discrimination in its voting practices, yet minority voters may be

unable to establish a violation of the Voting Rights Act.[9] As the district court in *Shaw v. Hunt* reasoned:

> [T]here may be cases in which a state will have a compelling state interest in engaging in race-based redistricting to remedy identified instances of discrimination in its own political processes, even when it has no firm basis for concluding that § 2 requires it to do so: for example, when it has a history of official racial discrimination in its electoral system, which has resulted in the virtual exclusion of members of a particular racial minority from participation in its political processes, but it knows that the creation of majority-minority districts is not required by the "effects" prong of § 5, because it has never had such districts before, and that the relevant minority group cannot show that § 2 requires the creation of any majority-minority districts . . .

861 F. Supp. at 444.

Thus, the district court was wrong in concluding that the Voting Rights Act provides the sole basis to justify a minority district. *Shaw* recognized an independent justification in remediating historic discrimination, which the court below failed to consider.

B. The Eleventh Congressional District Is Narrowly Tailored

Since the lower court concluded that only § 2 of the Voting Rights Act provided a compelling state interest, its inquiry into narrow tailoring was limited to determining whether the Eleventh District was required under § 2.

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[9] For example, a jurisdiction may dilute minority voting strength by intentionally fragmenting a cohesive, geographically compact minority population over a period of several decades, even though the group is insufficient in numbers to comprise a majority in a single member district as required in *Gingles*. *See Garza v. Los Angeles County Board of Supervisors*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991). In addition, this Court has expressly declined to rule on whether a minority group unable to comprise a majority in a single member district can nonetheless establish a § 2 violation. *Voinovich v. Quilter, supra.*

But according to the lower court, "[t]he record fails to demonstrate compactness, chronic bloc voting or reasonably necessary black voting percentages in the Eleventh Congressional District." J.S. App. at 88. Therefore, the court held that the *Gingles* preconditions could not be established and the Eleventh District was "not narrowly tailored to comply with the putatively compelling interest of section 2 compliance." J.S. App. at 89.

In reaching this conclusion, the lower court ignored the weight of the evidence. With respect to the first *Gingles* factor, African American voters are sufficiently large in number and geographically compact to comprise a majority in a congressional district in south-central Georgia. As discussed above, *see supra* pp. 16-18, evidence in the record supports a conclusion that the Eleventh District is reasonably compact.

Although it is possible that the Eleventh District could have been drawn to be more geographically compact, there is no legal requirement, under § 2 or elsewhere, that a jurisdiction adopt the *most* geographically compact minority district possible. Since this Court has never even adopted a definition for geographic compactness, such a rule would require a jurisdiction to guess about how to draw its lines. Indeed, not only is there no legal standard of compactness, there is no uniform definition of compactness in the social science community, nor consensus among social scientists as to the meaning, relevance or measurement of compactness.[10] Nevertheless, a district

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[10] Even social scientists who contend that compactness should be a consideration in redistricting recognize that compactness can be conceptualized in many different ways. It can be defined in purely spatial terms (either with respect to its spread over a large geographical area or the convolutions of its borders), in terms of the distribution of the population within the district, or in terms of the district's conformity to natural boundaries, political subdivisions, transportation routes, precinct lines, etc. C.F. Niemi, Grofman, Carlucci, Hofeller, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerry-*

that is made up of intact county areas and which follows existing boundaries to as great an extent as the Eleventh District, cannot be considered non-compact.

As to the second and third prongs of the *Gingles* test, the court also erred in dismissing the convincing evidence of racially polarized voting. Dr. Allan Lichtman, an expert for the United States Department of Justice, conducted both a bivariate ecological regression analysis and a homogeneous precinct or extreme case analysis of the state.[11] Dr. Lichtman found a high level of political cohesion among African American voters and a strong pattern of racially polarized voting state-wide, as well as in the particular counties included within the Eleventh District. DOJ Ex. 24 at 7-9. For example, in the 1992 Democratic Primary runoff in the Eleventh District, between a white and an African American candidate, the African American candidate received only 23% of the white vote. *Id.* at 18. As a result of the polarized voting, preferred candidates of African Americans have been regularly defeated throughout the State.[12]

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mandering, 52 J.Pol. 1155 (1990). Beyond conceptual problems, some academics contend that an accurate measure of compactness is unattainable and therefore that compactness "should be either abandoned as a standard altogether, or left in the domain of the dictionary definition. . . ." Young, *Measuring the Compactness of Legislative Districts*, XIII Legis. Stud. Q. 105, 114 (1988). Finally, some authorities have argued that "the historical reason for compact districts—to lessen transportation and other costs—is less applicable today," and thus that the concept is of dubious relevance as a redistricting criterion. B. Cain, The Reapportionment Puzzle, p.33 (1984).

[11] These are the two standard methodologies accepted by this Court in *Thornburg v. Gingles*, *supra* and regularly employed by experts in vote dilution litigation. *See* B. Grofman, L. Handley, R. Niemi, Minority Representation and the Quest for Voting Equality, (1992).

[12] Dr. Joseph Katz, an expert for the State, attempted to criticize Dr. Lichtman's ecological regression analysis, however his criticism did not take into account Dr. Lichtman's homogeneous precinct

Based on this evidence, minority voters can satisfy the *Gingles* preconditions in south central Georgia. Therefore, Georgia had a compelling interest in drawing the Eleventh District in order to avoid a § 2 violation.

Finally, the court erred in determining that "the 60.36% black voting age population of the Eleventh [district] is excessive." J.S. App. at 84. The court reasoned that since the Eleventh District "had a black *registered* voter percentage of 57% . . . the probability afforded by the current Eleventh District represents more than an 'equal' opportunity and is in excess of that required by § 2 of the Voting Rights Act." J.S. App. 88. The court also noted that the "Second and Fifth Districts have 52.33% and 57.47% black voting age population, respectively, . . . [and] were sufficiently majority black to satisfy the DOJ and, so presumably the VRA." J.S. App. 84.

The court's holding is inconsistent with this Court's decision in *Gingles* and the findings of Dr. Lichtman. In *Gingles,* this Court held that § 2 requires *district specific* analysis. *Gingles,* 478 U.S. at 55-58. *See also Growe, supra.* Therefore, the lower court's reliance on minority percentages in other districts located in other areas of the state says little about the adequacy of the minority percentage of the Eleventh District.

Further, the district court was incorrect in concluding that the minority percentage of the Eleventh District was well in excess of the amount necessary to provide equal

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analysis and did not apply to Dr. Lichtman's principal analysis of elections conducted within the precincts of the current Eleventh District. Rather, on cross-examination, Dr. Katz admitted that his criticisms applied only to the small sample single county elections included as appendices to Dr. Lichtman's report. T.Vol. V, 76-80. Dr. Katz's own analysis of elections still demonstrates racially polarized voting. According to Dr. Katz's own best estimates, about 80% of Black voters voted for Black candidates, whereas only about 28% of white voters voted for Black candidates. State D. Ex. 170 at 21.

voting opportunities to minority voters. According to Dr. Lichtman:

> The results of the 1992 Democratic primary and runoff for Congress show that District 11 is not a "safe" district for congressional candidates of choice of black voters. Rather, the district is competitive for candidates of choice of both the black and white electorate. The 1992 Democratic primary election produced no clear winner, as black candidate McKinney led white candidate DeLoach by 31% to 25%. The runoff election between DeLoach and McKinney was a competitive one, with McKinney garnering 56% of the vote.

DOJ Ex. 24 at 20.

Dr. Lichtman's analysis revealed that, due to differential turnout rates between white and African American voters, only approximately 50% of the voters who actually cast ballots on election day will be African American. *Id.* at 24.[13] Since African Americans will comprise only half of the election day turnout in the Eleventh District, this district is, by definition, not overly safe. Accordingly, the record does not support the lower court's conclusion that the Eleventh District is not narrowly tailored.

C. The Approach To Narrow Tailoring Adopted By The Lower Court Is Unworkable

An additional problem with the lower court's analysis is that it assumes an exactness to the predictability of future election outcomes which is illusory. The lower court, under the guise of narrow tailoring, appears to impose a requirement that any majority minority district contain just the exact percentage of minority voters necessary to satisfy § 2 requirements—and no more. But this precise percentage is not readily ascertainable. Although social scientists have developed a number of techniques to

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[13] The expert for the plaintiffs, Dr. Ron Weber, found similar levels of turnout. P. Ex. 82 at 17.

predict the future viability of minority districts, it is an inexact science involving variables that cannot be controlled.

A district population, in numbers, racial/ethnic composition and turnout of minority and white voters, is constantly changing and cannot be determined with any precision. Election results also turn on future political conditions, as well as quality of candidates, funding and political organizations. In addition, a lack of prior black vs. white congressional elections within the boundaries of a newly formed congressional district requires that an analysis be indirect, and based on non-congressional elections.[14]

Finally, it is politicians, not statisticians or social scientists, who draw districts. The final shape and composition of districts reflect the give and take of the political process. Redistricting generally occurs under extreme time pressures, with little opportunity to conduct the requisite analysis apparently deemed necessary by the lower court.

For all these reasons, states must be given some latitude in drawing minority districts. The state must be free to ensure that the minority population in a majority minority district is sufficiently high to achieve the compelling state interest sought by the state—compliance with § 2 of the Voting Rights Act. In light of all of the uncertainties about predicting just where this critical target is, the state must have some reasonable flexibility to aim a little high, in order to ensure that it not hit a point that in practice turns out to be too low. Accordingly, so long as the minority percentage in a district is not unreasonably high, it should not be held to violate the narrow tailoring standard. The imposition of the approach proposed by the district court would place a nearly impossible requirement on legislative bodies.

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[14] All the experts in *Johnson* relied on exogenous elections for their conclusions on the level of racially polarized voting.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the lower court.

Respectfully submitted,

WAYNE ARDEN *
1225 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-2004

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE
& ENDRESON
1250 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 682-0240

* Counsel of Record